United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL + proof of service

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P/S

To be argued by
JESSE BERMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- : Docket No. 75 - 1382

THOMAS AUSTIN, :

Appellant. :

----------x

BRIEF FOR APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION
RENDERED IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK.

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TABLE OF CASES

UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, :

Appellee, :

-against- :

THOMAS AUSTIN, :

Appellant. :

----------x

ISSUES PRESENTED

1. Whether the government failed to prove beyond a reasonable doubt that appellant, whose file could not be located by his local board for a period of undetermined duration during the time at issue, failed to advise his board of an address where mail would reach him.

2. Whether the facts found by the District Court are inconsistent with a criminally culpable state of mind on the part of appellant.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (Weinstein, J.), rendered November 7, 1975, convicting appellant, after trial by the court, of failure to keep his local draft board advised of an address where mail would reach him [50 U.S.C. App. §462(a)], and sentencing him, as a Young Adult Offender [18 U.S.C. §§5010(a), 4209], to probation.

Timely notice of appeal was filed and this Court, on November 11, 1975, appointed Jesse Berman, Esq., as counsel on appeal, pursuant to the Criminal Justice Act.

Appellant is presently serving the sentence imposed herein.

B. Statement of Facts

Appellant was indicted, under 50 U.S.C. App. §462(a), for three alleged offenses under the Military Selective Service Act of 1967:

Count I charged him with refusal to submit to induction from August 13, 1970, through May 4, 1972.

Count II charged him with failure to report for a physical examination from October 16, 1969, through May 4, 1972.

Count III charged him with failure to advise his local board of an address where mail would reach him from July 26, 1969, throught May 4, 1972.

The Court, after trial, found appellant not guilty on Count I, not guilty on Count II and guilty on Count III (T.51,70).*

The evidence at appellant's trial was limited to Selective Service documents, a stipulation, and the testimony of one witness - appellant's mother, who was called by the government to testify against her son.

Mrs. Mary Jenny Austin testified that at the time in question she lived at 115-46 144th Street, Ozone Park, Queens (T. 17-18). This was the address which appellant gave his local board when he registered with the draft in 1968, and is the only address for him in his Selective Service file.

Mrs. Austin testified that in 1968 appellant lived with her at that that address, together with three of her other children (T.18). Appellant did not reside with her in June 1969, or in October 1969, and appellant did not provide her with a forwarding

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*/ "T" refers to minutes of trial, October 23, 1975.

**/ The earliest date covered by the allegation in the indictment is July 26, 1969.

address (T.28). She identified two envelopes from Selective Service, postmarked June 1969 and October 1969 respectively, and she testified that she had written on the June envelope, "Please return to sender, receiver not at this address," and that she "must have returned both envelopes to the Post Office " (T. 18, 26-28).

Mrs. Austin indicated that appellant had left home "maybe" in 1968:

> THE WITNESS: I said maybe it was. I may sound foolish saying "maybe," but nevertheless, when a child leaves home with a misunderstanding -- if I can put it the way it really is, when he leaves home with a misunderstanding -- I guess he doesn't want contact with home and you have all sorts of different feelings about it.
>
> The mother does, the child does, too. It takes time for the child to get himself together to even contact home because of his pride. Whatever might have come inbetween (sic) because you're thinking of one point of view about the service and I'm thinking of a personal of family life.
>
> (T.30)

When she made the notations on the June and October 1969 envelopes, Mrs. Austin did not know where appellant was in order to forward the envelopes. She also received mail addressed to appellant in 1970(T.33), when she had no forwarding address for him (T.38), but "I don't think it was from Selective Service" (T.34, also T.35).

At times, appellant contacted her, "to say Happy

Mother's Day or something like that," and he also visited the house (T.33-34).

Without referring to any particular point in time, Mrs. Austin testified that:

> ...the mail did come in and I did send it back.
>
> * * *
>
> ...the main reason I sent it back was because I wanted it to stop coming to my home.
>
> * * *
>
> It was embarrassing to my family because not only did the FBI come to my door, they went through the whole building.
>
> * * *
>
> I didn't keep up with the dates, but somebody was always calling or somebody was always coming.
>
> (T. 35-36)

Mrs. Austin said she also "may have" thrown out some of appellant's mail (T.40,41).

After the government rested (T.41), the Court, in colloquy, made certain observations with regard to Mrs. Austin's testimony:

> THE COURT: The testimony of the mother was this [144th Street address] was not his residence. That doesn't mean he didn't get notice.
>
> * * *
>
> They [the government] are claiming that he did get notice.
>
> (T.43-44)

> I don't think she returned it all. I don't so read her testimony. I think she possibly gave him the mail that wasn't returned. She didn't look to me like the kind of woman who throws away official documents.
>
> She either gave it to him or threw it in the mail box with the return notation on it.
>
> (T. 45)

It was stipulated that:

> ... the government has no evidence that the defendant has ever used any name other than THOMAS MARTIN AUSTIN, or that he has used any false Social Security number or any other false identifying documents.
>
> (T. 10,46)*

In the course of colloquy at the close of the case, the prosecutor took the following position:

> MR.MAHER: The argument we have, of course, is that the notices were properly addressed and not returned by the post office.
>
> * * *
>
> ...it seems quite apparent from the record [that Mrs. Austin] didn't return all the mail from Selective Service, namely the preinduction order of June, 1970 and the induction order of July, 1970.
>
> There is enough factual material to indicate those two orders were properly mailed and were received sometime after their issuance upon one of the infrequent visits or contacts that the defendant had with Mrs. Austin.
>
> (T.49)

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*/ The entire stipulation is reproduced in appellant's appendix, at Item D.

The Court responded that:

> ... even though he physically doesn't receive the notice, if a parent reads it to him over the phone, that constitutes notice.
>
> * * *
>
> The mother's testimony is ambiguous on the issue of whether at any time she turned over any of the documents in question to the defendant or read him their contents or informed him orally of their contents.
>
> (T. 50-51)

In arguing for a judgment of acquittal on Count III,* appellant called the Court's attention to the delinquency report, which was in evidence as as part of the Selective Service file (T.55),** and which showed that there had been vandalism at appellant's local board. The report showed that the vandalism was of so serious a nature that, when the board prepared the delinquency report (December 8, 1970), it was unable to ascertain appellant's physical description, date of registration or place of registration, all "due to vandalism at L.B.". Appellant argued that since this missing information appears in the file, in the classification

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*/ Count III, as noted earlier, charged appellant not with failing to advise the board of his actual residence address [32 CFR §1641.7], but rather with failure to advise the board of an address through which mail would reach him [32 CFR §1641.3]. (See the amendment of the indictment, at T.5).

**/ The delinquency report is reproduced in appellant's appendix, as Item E.

Questionnaire and on the very front cover of the file, appellant's file apparently could not be found in December 1970 due to the vandalism. Appellant argued, therefore, that, since his file had been lost for a period of undetermined duration, the government had not, as a matter of law, proved beyond a reasonable doubt that he had, at the time in question, failed to notify the board of a new address by which mail could reach him (T.55-59). The Court rejected this argument.*

Appellant further argued that even if it had been proven that he had failed to advise the board of a new mailing address, the government had failed to prove any criminal intent on his part (See colloquy at T. 64-70). Although the Court rejected this argument, it did, in the course of colloquy, note the following:

> There's nothing in the record to suggest that this defendant had any thought whatsoever of Selective Service and I agree with you and I so find. His failure did not result so far as the record shows from any deliberate intent on his part to disrupt Selective Service or to keep Selective Service from being in touch with him, but he failed to give notice.
>
> (T. 69)

* * *

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*/ The entire relevant colloquy on appellant's motions for a judgment of acquittal appears in appellant's appendix, as Item C.

> I find beyond a reasonable doubt that the defendant was made aware of the fact that he had a duty to keep Selective Service Board advised of the place where he would receive mail.
> He may ultimately have forgotten about that duty but I don't think that has any impact here.
>
> (T.70)

In sentencing appellant to probation, as a Young Adult Offender, the Court again made reference to:

> ... the fact that commission of the crime appears to have been due to emotional, family problems rather than a desire to flout the national law.
>
> (S.8)*

ARGUMENT

POINT I

THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT, WHOSE FILE COULD NOT BE LOCATED BY HIS LOCAL BOARD FOR A PERIOD OF UNDETERMINED DURATION DURING THE TIME AT ISSUE, FAILED TO ADVISE HIS BOARD OF AN ADDRESS WHERE MAIL WOULD REACH HIM.

In the instant case, it was incumbent upon the government to prove, beyond a reasonable doubt, that, after July 26, 1969, appellant never advised his local board of an address where mail would reach him. 32 CFR §1641.3.

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*/ "S" refers to minutes of sentence, November 7, 1975.

The government sought to meet this burden of proof by relying on the Selective Service file, i.e., by relying on the fact that no evidence of any such advice-of-address appears in the file.

But that very same file shows that, at some time prior to December 8, 1970, there had been vandalism at that local board, and that, due to the vandalism, the board had been unable to locate several items of information which had previously been in appellant's file. It is very possible that appellant did advise the board of a new mailing address during the time covered by the indictment. He may have done so by a written communication or by an oral notification, either in person or over the telephone, which the board should have then reduced to writing on a Report of Information form (SSS Form 119).

In a normal case, the absence from the file of any such written communication from the registrant or Report of Information from the registrant, coupled with the presumption of regularity, and with proof that the prior address was inoperative, would be sufficient to permit a finding, beyond a reasonable doubt, that the registrant failed to advise his board of a new mailing address.

The instant case, however, is not a normal case. The presumption of regularity can not operate here, for the government's own evidence shows that the regularity was interrupted here, for a period of unknown duration,

during which appellant's file was lost, due to vandalism. If appellant had advised the board of his new mailing address prior to the vandalism, such notification might well have been lost or destroyed by the subsequent vandalism. If he so advised the board after the vandalism, such communication might never have been placed in his file because, as was shown, his file was lost or misplaced due to that vandalism.

Thus, even though the government may have established that the 144th Street address was inoperative* for at least some part of the alleged period in Count III,

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*/ We are reluctant to concede that the 144th Street address was really ever inoperative. It should be recalled that at one point the government argued that appellant had actually received oral notice of his pre-induction orders through his mother (T.49). And the Court found that:

> The mother's testimony is ambiguous on the issue of whether at any time she turned over any of the documents in question to the defendant or read him the contents or informed him orally of their contents.
>
> (T.51)

Even if appellant did not reside at the 144th Street address at the time in question, that address was satisfactory and §1641.3 was complied with if his mother advised him of the contents of his mail. Bartchy v. United States, 319 U.S. 484, 489 (1942); Ward v. United States, 344 U.S. 924(1953); United States v. Burton, 472 F.2d 757 (8th Cir. 1973); United States v. Jarvis, 6 SSLR 3077(S.D.N.Y., July 19, 1972). And the Court certainly did not find beyond a reasonable doubt that Mrs. Austin did not so advise appellant.(T.51).

and even though no notice of new address appears in the file as it existed at the time of trial, the file itself rebuts any presumption of regularity in this case and it is impossible, as a matter of law, to hold that it has been proven, beyond a reasonable doubt, that appellant did not advise the board of his new mailing address.

The judgment must be reversed and the indictment dismissed.

POINT II

THE FACTS FOUND BY THE DISTRICT COURT ARE INCONSISTENT WITH A CRIMINALLY CULPABLE STATE OF MIND ON THE PART OF APPELLANT.

Mrs. Austin, who was called by the government, testified that appellant left home, not to avoid Selective Service, but because of a personal, family quarrel(T.30).

It was stipulated that appellant had never used any false names or false identification papers.*

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*/ Indeed, it was stated by counsel, without dispute, at the time of sentence that:

> ... for the past two years he has been working full time as an officer in the Model Cities Administration, community officer in Harlem.
>
> When arrested on August 4 [1975] by the FBI, they found him working at the Police Precinct under his regular name.
>
> (S.5)

The Court itself specifically found that appellant did not intentionally lose contact with Selective Service, and that he apparently did so because of emotional or family problems or because of forgetfulness:

> THE COURT: There's nothing in the record to suggest that this defendant had any thought whatsoever of Selective Service and I agree with you and I so find. His failure did not result so far as the record shows from any deliberate intent on his part to disrupt Selective Service from being in touch with him, but he failed to give notice.
>
> (T. 69).
>
> * * *
>
> He may ultimately have forgotten about the duty ... .
>
> (T. 70).
>
> * * *
>
> ... commission of the crime appears to have been due to emotional, family problems rather than a desire to flout the national law.
>
> (S.8)

On the facts of this particular case, both as found by the District Court and when the record is taken as a whole, appellant's conduct was inconsistent with a criminally culpable state of mind.

A necessary element which had to be established by the prosecution in this case was "proof of a culpable intent." United States v. Neilson, 471 F.2d 905,908 (9th Cir. 1973); Graves v. United States,252 F.2d 878

(9th Cir. 1958). In the instant case, where the Court, as trier of fact, found an absence of criminal intent, where the record shows no culpable state of mind, where the Court acquitted appellant of knowingly violating any orders to report for induction or for a physical exam, and where the duty allegedly violated was not a malum per se,* the words of the Supreme Court in Ward v. United States, 344 U.S. 924 (1953), are on point:

> ... there was no deliberate purpose on the part of the petiioner not to comply with the Selective Service Act or the regulations thereunder.
>
> 344 U.S. at 924.

In the absence herein of a deliberate, culpable state of mind, the judgment must be reversed and the indictment dismissed.

CONLCUSION

THE JUDGMENT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully submitted,

JESSE BERMAN
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[212] 431-4600

December 24, 1975.

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*/ See, Morisette v. United States, 342 U.S. 246 (1952).

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JESSE BERMAN, being duly sworn, deposes and says:

That on the 24th day of December, 1975, I served the within appellant's brief upon David Trager, attorney for appellee in this action, at 225 Cadman Plaza East, Brooklyn NY 11201, the address designated by said attorney for that purpose, by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Jesse Berman

JESSE BERMAN

Sworn to before me this
24th day of December, 1975.

Steven Bernstein

STEVEN BERNSTEIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-4520522
Qualified in New York County
Term Expires March 30, 1976